IN THE SUPREME COURT OF THE UNITED STATES
November Term, 1976

No. 76-991

CONSTANCE KOTTIS, as Administratrix
of the Estate of Christos Kottis,
Petitioner

-vs-

UNITED STATES STEEL CORPORATION,
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Seventh Circuit

Robert F. Peters
606 Twin Towers South
1000 East 80th Place
Merrillville, IN 46410
Phone: (219) 769-3561
Counsel for Petitioner

James A. Holcomb
606 Twin Towers South
1000 East 80th Place
Merrillville, IN 46410
Phone: (219) 769-3561
Counsel for Petitioner

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CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis, Plaintiff-Appellant in the Court below, prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 18, 1976.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Indiana, Hammond Division, is unreported. A copy of said opinion is appended to this petition as "Exhibit A." The opinion of the Court of appeals for the Seventh Circuit is reported at 543 F. 2d 22 (1976).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on October 18, 1976, and a copy thereof is appended to this petition in the Appendix at pp. v.
as "Exhibit B." The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The District Court acquired jurisdiction of this matter originally by reason of diversity of citizenship as provided in 28 U.S.C. 1332.

QUESTIONS PRESENTED

CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis, brought this wrongful death action against UNITED STATES STEEL CORPORATION for the violent death of her Decedent, an employee of UNITED STATES STEEL CORPORATION. Plaintiff brought said action against UNITED STATES STEEL CORPORATION attempting to hold UNITED STATES STEEL CORPORATION liable as (1) the owner of the land on which Plaintiff's Decedent was fatally injured and (2) as the producer-manufacturer of a defective product. The District Court for the Northern District of Indiana, Hammond Division, held that Plaintiff's action against UNITED STATES STEEL CORPORATION was barred by the exclusive remedy provisions of the Indiana Workmen's Compensation Act, notwithstanding the fact that the wrongful death action was being prosecuted against UNITED STATES STEEL CORPORATION under their distinct and separate legal capacities as owner of the premises and producer-manufacturer of the defective product. Plaintiff argued that these capacities gave rise to independent and separate legal obligations and responsibilities apart from the employment relationship. The Court of Appeals for the Seventh Circuit affirmed the decision of the District Court in granting final judgment in favor of the Defendant UNITED STATES STEEL CORPORATION. The questions presented are:

A. Did the Court err in granting summary judgment for the employer based on the exclusive remedy provisions of the Indiana Workmen's Compensation Act since the wrongful death action brought on behalf of the employee was brought against employer, not as employer, but as a party owing separate and distinct obligations to Plaintiff arising outside of the employer-employee relationship?

B. Did the Court err in making the factual determination that the Defendant, UNITED STATES STEEL CORPORATION, did not manufacture or design

the dangerous instrumentality in question where answers to Interrogatories filed by UNITED STATES STEEL CORPORATION stated that the hinged trap door was cut to size and installed as a replacement grating by employees of UNITED STATES STEEL CORPORATION?

C. Did the Court err in refusing to grant Plaintiff relief under Rule 56(f) of the Federal Rules of Civil Procedure?

The issues contained at B and C above are included only to perfect Petitioner's right to contend that UNITED STATES STEEL CORPORATION was the producer-manufacturer of a dangerous product so that issue A may be fully examined.

APPLICABLE STATE STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

This case involves that application of the following provisions of the Indiana Workmen's Compensation Act: Indiana Code (I.C.) 22-3-2-6 and 22-3-2-13. Said provisions of Indiana Statute and the provisions of Trial Rule 56(c) and (f) of the Federal Rules of Civil Procedure are set forth in the Appendix at pp. XX .

STATEMENT

Plaintiff's Decedent, Christos Kottis, was fatally injured on the premises of UNITED STATES STEEL CORPORATION while engaged in the scope of his employment as an overhead-crane operator on November 18, 1974. Plaintiff's Amended Complaint for wrongful death charges that UNITED STATES STEEL CORPORATION was the owner of the real estate on which the Decedent died and it permitted a certain floor grating in an overhead crane on which the Deceased worked to exist in a hazardous and unsafe condition, thereby causing Decedent to plummet to his death. (No. 9, Amend. Comp. at pp. 1-2). Plaintiff also charges that UNITED STATES STEEL CORPORATION was the manufacturer, designer, producer

and installer of the defective hinged door grating device and that said door grating was unreasonably dangerous in normal and ordinary use in that said door grating was defectively designed, modified, tested, inspected, installed, fabricated and manufactured resulting in a defective and unreasonably dangerous product. (No. 9, Amend. Comp. at pp. 3-4) The answer to Plaintiff's Amended Complaint filed by UNITED STATES STEEL CORPORATION stated that Plaintiff's Decedent was an employee; that Plaintiff had received an award of Workmen's Compensation for the accident in question; and that the within cause of action was barred by the exclusive remedy provisions of the Indiana Workmen's Compensation Act. (No 14 Def's. Answer)

At the time of filing its Answer, UNITED STATES STEEL CORPORATION also filed a Motion for Protective Order purportedly pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Said Motion requested the District Court to enter an order determining that the Defendant need not respond to Interrogatories or the Motion to Produce previously served upon it by the Plaintiff. Said Motion for Protective Order was based upon Defendant's contention that the present action was barred by the exclusive remedy provisions of the Compensation Act. (No. 15, Def's. Mot. for Prot. Ord.) On December 24, 1975, UNITED STATES STEEL CORPORATION filed its Motion for Summary Judgment again based on the exclusive remedy provisions of the Compensation Act. (No. 16, Def's. Mot. for Sum. Judg.)

On January 16, 1976, Plaintiff filed her Motion to Deny the Protective Order requested by UNITED STATES STEEL CORPORATION. The Motion showed that UNITED STATES STEEL CORPORATION had filed its Motion for Summary Judgment, that said Defendant had exclusive knowledge of the circumstances complained of in Plaintiff's Complaint, and that Plaintiff could not possibly defend against a Motion for Summary Judgment without receiving answers and responses to discovery previously served upon said Defendant by Plaintiff. (No. 23, Mot. to Deny Prot. Ord.)

Plaintiff defended against Defendant's Motion for Summary Judgment pointing out to the District Court that the exclusive remedy provisions of the Indiana Workmen's Compensation Act did not apply to Plaintiff since Plaintiff was suing UNITED STATES STEEL CORPORATION not as employer, but as a person owing separate legal obligations to Plaintiff by reason of the ownership of real property and by reason of its status as a producer-manufacturer of an inherently dangerous product. Plaintiff stated that she was suing UNITED STATES STEEL CORPORATION as a third party under the so called "Dual Capacity Doctrine." (No. 24, Pltf's. Reply Memo. to Def's. Mot. for Sum. Judg.)

Plaintiff's Reply Memorandum to Defendant, UNITED STATES STEEL CORPORATION'S, Motion for Summary Judgment also invoked the provisions of Trial Rule 56(f) of the Federal Rules of Civil Procedure. Plaintiff stated that Summary Judgment should be denied at the time in question since she had made a proper showing that she was unable to present by affidavits the facts essential to justify her opposition to Defendant's Motion for Summary Judgment. Plaintiff pointed out that the inability was caused by the fact that UNITED STATES STEEL CORPORATION had sole possession and knowledge of all the facts surrounding the death of Plaintiff's Decedent and said Defendant had refused to submit to open discovery. The only knowledge that Plaintiff possessed was from facts volunteered by Defendant. (No. 24, Pltf's Reply Memo. to Def's. Memo. for Sum. Judg. at pp. 15)

On January 21, 1976, UNITED STATES STEEL CORPORATION filed its response to Plaintiff's Motion to Produce. Said response cited that several of the documents requested had been voluntarily produced for Plaintiff's inspection, however, the great majority of items requested were objected to by UNITED STATES STEEL CORPORATION on the basis of its prior Motion for Protective Order. (No. 31, Def's. Res. to Mot. to Prod.) On January 26, 1976, UNITED STATES STEEL CORPORATION filed answers to certain

of Plaintiff's Interrogatories. Of the 32 Interrogatories submitted, the Defendant responded to only 10 Interrogatories of their own choosing. The remainder of the Interrogatories were objected to on the basis of Defendant's prior Motion for Protective Order. (No. 32, Def's. Ans. to Interrogatories) The answer of UNITED STATES STEEL CORPORATION to Interrogatory 16 indicated that the hinge door grating through which the Decedent fell to his death was a replacement grating installed by employees of UNITED STATES STEEL CORPORATION. It was further answered that UNITED STATES STEEL CORPORATION purchased the grating and cut it to size. (No. 32, Def's. Ans. to Interrogatories at pp. 3)

Thereafter, on January 28, 1976, Plaintiff filed her Affidavit in Support of her Motion to Deny Protective Order. Said Affidavit stated that Plaintiff had no knowledge or source of knowledge regarding the facts and circumstances surrounding her husband's death. The Plaintiff further stated that she believed UNITED STATES STEEL CORPORATION had sole knowledge and control of the facts and circumstances surrounding the death. Lastly, said Affiant stated that by reason of UNITED STATES STEEL CORPORATION'S refusal to fully respond to Interrogatories and Plaintiff's Motion to Produce, the Plaintiff did not have present access to the facts necessary to combat the Defendant's Affidavits in Support of its Motion for Summary Judgment. (No. 35, Plf's. Aff.) On January 30, 1976, the Plaintiff filed and submitted to UNITED STATES STEEL CORPORATION a Supplemental Motion to Produce and further Supplemental Interrogatories specifically directed to the issue of the design, manufacture and installation of the hinged door grating device in question. (No. 37, and 38) The Supplemental Interrogatories and Motion to Produce were never responded to by the Defendant.

Notwithstanding Plaintiff's inability to combat the Affidavits of the Defendant, UNITED STATES STEEL CORPORATION, on its Motion for Summary Judgment, and

notwithstanding the Plaintiff's attempt to secure relief under Rule 56(f), the District Court on February 10, 1976, granted the Defendant's Motion for Summary Judgment. Said Order directed counsel for the Defendant to submit a form of Final Judgment, together with suggested Findings of Fact and Conclusions of Law. On February 25, 1976, the District Court entered Final Judgment in favor of UNITED STATES STEEL CORPORATION and against the Plaintiff. The Court determined, as a fact, that neither UNITED STATES STEEL CORPORATION nor any of its agents, servants or subsidiaries were the manufacturer or designer of the dangerous instrumentality in question. (No. 44, Ord. of Judg. at pp. 3 and 5) Said Final Judgment determined that Plaintiff's action was barred by the exclusive remedy provisions of the Indiana Workmen's Compensation Act notwithstanding the fact that UNITED STATES STEEL CORPORATION was being sued in its separate capacity as the owner of real estate and as the producer-manufacturer of a dangerous instrumentality.

On October 18, 1976, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court Judge.

REASONS FOR GRANTING WRIT OF CERTIORARI

The decision below should be reviewed because it erroneously decides an important question of the law of the State of Indiana which is of first impression in Indiana and the United States Court of Appeals for the Seventh Circuit. Further, the manner in which Indiana Law was applied to this action defies the rule of statutory construction set forth by this Court in Reed v. Yaka (1963) 373 U.S. 410, 83 S.Ct. 1349, and deprives the Plaintiff and all others similarily situated of her right to seek redress in the Courts for the wrongful death of her husband arising out of an industrial accident. The rights of working class people are frequently jeopardized, demasculated, or simply legislated away by the superior power and influence of their employers. The Petitioner stands before you urgently in need of this Court's assistance.

The District Court and the Court of Appeals for the Seventh Circuit held that Plaintiff's cause of action for the wrongful death of her Decedent was barred by the exclusive remedy provisions of the Indiana Workmen's Compensation Act. The relevant provisions of the Act provide as follows:

> I.C. 22-3-2-6. The rights and remedies hereingranted to an employee subject to this act... on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, common law or otherwise, on account of such injury or death.
>
> I.C. 22-3-2-13. Whenever an injury or death, for which compensation is payable...shall have been sustained under circumstances creating in some other person other than the employer and not in the same employ, a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against such other person to recover damages notwithstanding such employer's or such employer's compensation insurance carriers' payment of or liability to pay compensation under Chapters 2 through 6 of this article....

Plaintiff has continually shown the Court that her action was maintained against UNITED STATES STEEL CORPORATION for breach of legal duties and responsibilities owed by reason of legal capacities that are separate and distinct from the employer-employee relationship. In this respect, Plaintiff is bringing suit against UNITED STATES STEEL CORPORATION as a "third party" or a "person other than the employer and not in the same employ." Common sense tells us that UNITED STATES STEEL CORPORATION is not only the employer of Plaintiff's Decedent, but also was capable of being a producer-manufacturer of a dangerous instrumentality or the owner of real estate negligently maintained. Several of the cases holding that the

employer is liable to its employee as a third party, irrespective of the exclusive remedy provisions of the Workmen's Compensation Act, have referred to this as the "dual capacity doctrine."

Plaintiff's Decedent was killed when a misaligned hinged trap door failed as the deceased stepped upon it while walking on an overhead-crane platform. As a result of the defective trap door, the deceased fell thirty feet to his death below. Practically the same factual considerations existed in the case of Reed v. Yaka, supra. In Reed v. Yaka, the Plaintiff was standing on certain wooden palettes used in loading the vessel and was injured when a defective plank in one of the palettes caused it to break. The Plaintiff then filed an in rem action against the vessell Yaka and the ship's owner, Waterman Steamship Corporation, appeared as Claimant of the ship. However, Waterman brought in Plaintiff's employer, Pan-Atlantic Corporation, as an additional Defendant. The United States Supreme Court specifically held that the Plaintiff's employer, Pan-Atlantic, was personally liable for the unseaworthiness of the ship which caused petitioner's injury.

In Reed, supra., the Defendant Pan-Atlantic employed long-shoreman directly instead of following the more common practice of engaging a stevedoring company to handle its loading and unloading. Plaintiff, an injured longshoreman, brought suit for the unseaworthiness of the vessel. The employer defended, as does the UNITED STATES STEEL CORPORATION here, on the basis of the exclusive remedy provisions of the Longshoreman's and Harbor worker's Compensation Act. The United States Supreme Court stated that:

> Only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that the employer of a longshoreman was also the bareboat charterer... charged with the traditional, absolute and nondelegable obligation of seaworthiness which it should not be permitted to avoid.

Therefore, the employer, who was also liable and paid compensation benefits under the Longshoreman's Act, was held by the Supreme Court to be liable to his employee as owner of the vessel, for injuries arising out of the unseaworthiness of the vessel, notwithstanding the exclusive remedy provisions of the Act.

In the Reed case, the Defendant owed special obligations because of its status as owner of the vessel. In the instant case, UNITED STATES STEEL CORPORATION owes special obligations because of its status as owner of the premises and as a manufacturer-designer. As such, United States Steel Corporation is being sued as a third party with respect to UNITED STATES STEEL CORPORATION, the employer. As expressed in Reed, supra., when there is an independent set of obligations, the exclusive remedy provision cannot be invoked for the defendant to escape liability. UNITED STATES STEEL CORPORATION'S obligations as an owner of real estate or an a manufacturer-designer, have nothing whatever to do with the employer-employee relationship. These responsibilities and duties extend to anyone that might use or come into contact in any manner with the real estate or the product in question.

Perhaps the most compelling reason that this Court should review the lower Court's decision is that the express issue ruled upon has never before been ruled upon by the Seventh Circuit or the Courts of the State of Indiana. Furthermore, Petitioner believes that there are no other Circuit Court of Appeals decisions deciding the issue involved. The only Federal Appeals case decided on this point is Reed v. Yaka, and the Seventh Circuit has decided that it will not follow the rule laid down in that case. This Court's discretion to review the matter is merited by reason of the fact that there is no Court authority applying Indiana law that has ever specifically considered the dual capacity theory. Certainly, no case has ever specifically denied its application in the State of Indiana. Since there are precedent decisions outside of the State of

Indiana favoring the construction urged by Petitioner herein, and since the United States Supreme Court has adopted this rule in Reed v. Yaka, this is an excellent opportunity for the Court to interpret the law in such a manner as will accord Plaintiff's Decedent substantial justice and in such a manner as will benefit all other employees in a similar circumstance who are forced to work in unhealthy, hazardous and dangerous premises. To deny the Plaintiff a remedy under the facts of this case will only encourage big business to promote their interest at the expense and welfare of their employees. While employees, as employees, are subject to the provisions of the Workmen's Compensation Act, it is inhuman to suggest that they are not also members of the public entitled to the protection of the laws of the State of Indiana and the United States of America as they concern responsibilities and liabilities of owners of real estate and producers-manufacturers of dangerous instrumentalities.

The opinion of the Seventh Circuit Court of Appeals seemed to be greatly influenced by such cases as Hickman v. Western Heating and Air-Conditioning Company, 207 F. Supp. 832, 833 (N.D. Ind. 1962); North v. United States Steel Corp., 495 F. 2d 810, 813 (7th Cir. 1974); Harshman v. Union City Body Co., 105 Ind. App. 36, 39-40, 13 N.E. 2d 353, 354 (1938); Reunion v. Indiana Glass Co., 105 Ind. App. 650, 16 N.E. 2d 961 (1938); Selby v. Sykes, 189 F. 2d 770, 773 (7th Cir. 1951); Peski v. Todd & Brown, Inc., 158 F. 2d 59, 60 (7th Cir. 1946). In each of these cases, the Court, applying Indiana law, held that the Plaintiff's action was barred by the exclusive remedy provisions of the Indiana Workmen's Compensation Act. However, not a single one of these cases or the other cases cited by UNITED STATES STEEL CORPORATION involved the dual-capacity theory advanced by Petitioner herein. In each instance, the employee filed his lawsuit against the employer as employer, for violation of duties had by reason of the employment relationship. For this reason, several of the cases involve employee suits

charging negligence in the manner in which the employer directed the performance of certain work. For example in Selby v. Sykes, supra., it was contended that the employer was negligent in instructing that the employee do work on a roof despite bad weather conditions and inspite of not providing sufficient safety devices, thereby causing his fall. A number of the cases cited involve situations where the employee sued his employer as employer claiming willfull and wanton conduct entitling him to punitive damages. Again the Court determined that such actions were barred by the exclusive remedy provisions of the Workmen's Compensation Act. See North v. United States Steel Corporation, supra., and Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E. 2d 364 (1945). Many of the plethora of cases cited involve situations where the employee sued his employer as employer for violation of particular legislation such as the Indiana Employer's Liability Act, or Indiana Factory Act. See Harshman v. Union City Body Co., supra., North v. United States Steel Corporation, supra., and Markham v. Hettrick Manufacturing Co., 118 Ind. App. 348, 79 N.E. 2d 548 (1948).

The great majority of cases cited by the UNITED STATES STEEL CORPORATION and the Seventh Circuit Court of Appeals involve cases where the employee's suit against the employer contended that the injury did not arise out of and during the scope of the employment. See Peski v. Todd & Brown, Inc., supra., Harshman v. Union City Body Co., supra., and Daniel S. Wilson, Jr. v. Lehigh Safety Shoe Co., et al., Civil No. 69 H15. The Plaintiff CONSTANCE KOTTIS throughout the entire proceedings has vigorously asserted that none of the foregoing cases serve as precedent for the issue to be decided in this matter. In each instance the employee sued his employer for responsibilities owed as an employer. Not once was the Court called upon to determine whether the employee could sue his employer as a third party because the employer had assumed an additional legal capacity independent of the employment relationship. Cases contending that the injury did not arise within the scope of the

employment have no bearing whatsoever on the issue raised in this matter. The dual capacity theory presumes as a starting point that the injury did occur within the scope of the employee's employment. It goes on to hold that even though the employer has paid compensation under the applicable Workmen's Compensation Act, he is nevertheless liable as a third party if he has voluntarily assumed a legal capacity outside of the employment relationship giving rise to independent sets of legal responsibilities.

Petitioner is not requesting this Court to take unprecedented action. In addition to Reed v. Yaka, supra., the following cases have either expressly adopted the dual capacity theory or have accepted the basic principle involved: Duprey v. Shane, 106 Cal. App. 2d 6, 241 P. 2d 278 (1951); Marcus v. Greene, 13 Ill. App. 3d 699, 300 N.E. 2d 512 (1973); Mazurek v. Skaar, 60 Wis. 2d 420, 210 N.E. 2d 691 (1973); Costanzo v. Mackler, 34 Misc. 2d 188, 227 N.Y.S. 2d 750 aff'd. 233 N.Y.S. 2d 1016.

In the Duprey case, a chiropractor was found liable for malpractice in the negligent treatment of his employee's injury which occurred during the course of her employment. The Court reasoned that the capacity in which the chiropractor treated the Plaintiff was distinct from their employment relationship, and as a result, he was vulnerable to a third party action. The Court held that the doctor-employer was a "person other than the employer" within the meaning of the Compensation Act. The employer-physician undertook the legal obligations inherent in the doctor-patient relationship and was thus subject to suit for malpractice. In this case, the Defendant contended that the exclusive remedy provisions of the applicable Workmen's Compensation Act barred the action against the employer. The Court refused to apply the exclusive remedy provisions to this factual situation and their reasoning is set forth in the following excerpt from the opinion:

> ...(Defendants) say that such a result can be reached only on the theory that Dr. Shane had a dual legal personality--that is, Dr. Shane, the employer and Dr. Shane, doctor, and contend that the law frowns upon creation of such dual legal personalities....It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistice and purely legalistic. But where, as here, it is perfectly apparent that the person involved--Dr. Shane--bore towards his employee, two relationships--that of employer and that of a doctor--there should be no hesitancy in recognizing this fact as a fact. (At p. 15)

In Marcus v. Greene, the Plaintiff was an employee who was injured when the scaffolding on which he was standing collapsed causing him to fall to the ground. The Plaintiff first recovered workmen's compensation benefits and then brought an action against the employer in his capacity as owner of the real estate and the defective scaffolding on which Plaintiff was injured. The employer defended on the grounds of the exclusive remedy provisions of the Illinois Workmen's Compensation Act. The Illinois Court ruled that the employer could be sued as a third party as a result of the fact that he occupied an additional capacity, that of owner of the property. The facts of the case indicate that Jim Greene Construction Company was the employer while Jim Greene in partnership with another, was the owner of the real estate. James Greene d/b/a Jim Greene Construction Company was unincorporated and was a sole proprietorship owned by James Greene. Therefore, James Greene was the Plaintiff's employer and was also an owner of the real estate.

The Illinois Court expressly approved of the "dual capacity doctrine" and adopted the ruling of the United States Supreme Court in Reed v. Yaka, supra. The Illinois Court stated as follows:

> Thus, appellee's position that appellant could be liable for violating more than one

legal duty finds support in the highest court of our land. The Structual Work Act-like the doctrine of seaworthiness-was designed to provide a remedy for personal injuries and property damage sustained by particular employees. This duty of an owner in charge of the work is entirely separate from the duty of an employer. We see no reason to suppose that the Workmen's Compensation Act has in any way limited the duty of an owner in charge to assure that scaffolds on construction property be kept safe...

Nor do we believe that the appellee is barred from bringing suit by the language of the Workmen's Compensation Act, which provides that an employee has no common law or statutory right to recover from his employer. The holding in Gannon v. C., M., St., P. & P. Ry. Co., supra., is not applicable to the present facts, because that case involved an employer who was being sued under the Structural Work Act as an employer. The suit was properly dismissed, but the action in the instant case is not against the employer as an employer. It is against an employer who is also an owner.

. . . .

Therefore, we are pursuaded to agree with appellee that since the Workmen's Compensation Act provides for recovery by employee against a third party tort feasor..., he should be allowed to bring an action against the appellant who in a different legal capacity than that of an employer has placed himself vulnerable to liability under the Scaffold Act. To paraphrase the language of the United States Supreme Court in Reed v. Yaka, supra., we think it would produce a harsh and incongruous result to distinguish between liability to employees injured under precisely the same circumstances simply because some work on property owned by their employers and others worked on property owned by third parties....(at p. 517-18)

In Mazurek v. Skaar, supra., a national guardsman, employee, was permitted to sue the State of Wisconsin , employer, for injuries negligently caused by a fellow guardsman despite the exclusive remedy provisions of the applicable Workmen's Compensation Act.

Costanzo v. Mackler, supra., dealt with a lawsuit against a co-employee rather than against an employer. The principle, however, remains the same, since under the Indiana Workmen's Compensation Act, co-employees share the immunity of their employers. In this case, the Plaintiff, employee, was injured during the course of his employment when hewas riding on a truck that was rented to his employer by the Defendant, fellow employee. The Defendant was a regular employee, to-wit: a mechanic of the employer and in addition, he owned two trucks purchased by him out of his own funds which he rented to the employer and which were used by the employer in the course of this business. Based upon these facts, the New York Court stated that the alleged tort charged to the Defendant is independent of and not related to the common employment of both. In effect, what the New York Court held was that even though the employee was injured in the course of his employment, he could sue his fellow employee despite the exclusive remedy provisions of the New York Workmen's Compensation Act, since the fellow employee was being sued as the owner of the truck in question. In New York, as in Indiana, a fellow employee enjoys the same immunity by reason of the exclusive remedy provisions as does the employer.

Professor Larson discusses a dual capacity theory in Larson's Workmen's Compensation Law, Vol. 2, sec. 72.80. He states at p. 117 as follows:

> "The decisive dual capacity test is not concerned with how separate or different the second function of the employer is from the first but whether the second function generates obligations unrelated to those flowing from the first, that of employer. The legal

obligations of a ship owner to maintain the vessel in a seaworthy condition, for example, is quite independent of the status of employer. It differs in character and extent from that of a stevedoring company even if the stevedoring company also is the ship owner. The obligation would exist even if the ship owner had no employees, and it runs to persons other than employees.

Similarily, it can at least be argued that the liability of theowner of land is different from that of an employer working on the premises. The legal doctrines governing the responsibilities of landowners to different classes of persons entering upon the land are ancient and distinctive, and again are different in quality and range from the rules governing the liabilities of a contractor to his employees.

It is Petitoner's position that the Indiana Workmen's Compensation Act was intended only to apply to the employer-employee relationship. All liability under the Act is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment at the time of the injury. Noble v. Zimmerman, 237 Ind. 556, 146 N.E. 2d 828 (1957); B. A. Y. Construction Co. v. Smallwood, et al., 104 Ind. App. 277, 10 N.E. 2d 750 (1937). The entire purpose of the Act is to benefit and provide remedies to injured employees, not to favor employers. This being so, the Act is remedial in nature and should be given a liberal construction to accomplish the humane and benevolent purpose for which it was enacted. Burger Chef Systems, Inc. v. Wilson, 147 Ind. App. 556, 262 N.E. 2d 660 (1970); Welsch v. Welsch Aircraft Industries, 108 Ind. App. 545, 29 N.E. 2d 323 (1940).

The question to be determined by the Court is whether the compensation act, which was intended to provide benefits to employees, should be used to deprive an employee of his common law right to sue

his employer when his employer has assumed an additional capacity recognized by law giving rise to separate legal responsibilities. UNITED STATES STEEL CORPORATION has always urged the Court that the same liberal and broad interpretation for providing benefits under the Act must be used in determining the application of the exclusive remedy provisions of the Act. They contend that if the Act provides benefits to a particular employee, then the exclusive remedy ban is automatic.

This contention is not supported by the law of the State of Indiana. The Workmen's Compensation Act never, by its terms, makes any mention of the situation where an employer is sued, not as employer, but as a producer-manufacturer orowner of real estate. Indeed, there is no compelling reason why the Workmen's Compensation Act should be extended to situations or lawsuits brought that are not dependent upon the existence of the employment relationship. In order for the Seventh Circuit Court of Appeals to reach the decision it did, it was necessary for them to determine that the statute, when properly construed, applied to the instant case. Petitioner submits that this result cannot be properly reached when applying the Indiana law regarding construction of statutes in derogation of rights and remedies existing under common law.

Indiana law clearly provides that such statutes are strictly construed and in case of any doubt, they will be construed in such a manner as not changing the common law rule. If possible, the Court should construe such statute in a manner that also provides for the full protection of the common law remedy. Guardian Life Insurance Co. of America v. Barry, 213 Ind. 56, 10 N.E. 2d 614 (1937); Helms v. American Sec. Co. of Indiana, 216 Ind. 1, 22 N.E. 2d 822 (1939). It is clear that the Court should not use the process of statutory construction to arrive at its determination that a common law right or remedy is barred. Unless the specific terms of the statute bar such remedy, the common law remedy should survive. In the case at hand, there simply is no justification for applying the exclusive remedy provisions of the Indiana Workmen's Compensation Act to a Petitioner's lawsuit

against UNITED STATES STEEL CORPORATION as a producer-manufacturer and as a land owner. These separate legal capacities are not in any way dependent upon the employment relationship and are not limited by said relationship. The duties and responsibilities existing by reason of being a producer-manufacturer and land owner run to anyone in the general public who might come into contact with the product or land in question.

Public policy demands adoption of the dual capacity theory as the law of the state of Indiana. The entire public policy argument of the Defendant UNITED STATES STEEL CORPORATION relates to the theory and consept behind the original enactment of the Indiana Workmen's Compensation Act. Said Defendant addresses itself only to the workmen's compensation compromise. The employee gives up his common law cause of action regarding liabilities arising in the employer-employee relationship in consideration for the employer's payment of compensation benefits irrespective of common law liability. Certainly, Plaintiff does not question the philosophy behind workmen's compensation. The Plaintiff herein, CONSTANCE KOTTIS, does not dispute that the Indiana Courts have upheld the workmen's compensation compromise. The public policy argument advanced by UNITED STATES STEEL CORPORATION is simply not the relevant issue in the present case.

The Plaintiff does not question the propriety or the wisdom of the Workmen's Compensation Act. Plaintiff does, however, question the applicability of the exclusive remedy provisions of the Workmen's Compensation Act with respect to an employee who sues his employer, not by reason of any duties or responsibilities arising out of the employment relationship, but rather for violation of separate and distinct obligations which the employer has voluntarily assumed in a role other than that of employer.

UNITED STATES STEEL CORPORATION has advanced no compelling public policy argument as to why an employee injured by the negligence of his employer

should be denied the remedies available to the public in general under the laws of the State of Indiana and the United States of America, where the responsibilities and liabilities arise not out of the employment relationship but from the traditional duties of owners of real estate and producers-manufacturers of dangerous instrumentalities. UNITED STATES STEEL CORPORATION has advanced no compelling public policy argument as to why some employees may sue owners of property and producers-manufacturers for injuries occuring during their employment where they are distinct entities (third parties), while an employee under the same conditions is unable to bring a lawsuit for violation of the same duties and responsibilities by the mere fortuitous circumstance that the owner of the real estate and the producer-manufacturer is also his employer. In speaking of the same public policy consideration, the United States Supreme Court in Reed v. Steamship Yaka (1963) 83 S. Ct. 1349, 372 U.S. 410, held as follows:

> We have previously said that the Longshoreman's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." We think it would produce a harsh and incongruous result, one out of keeping with the dominent intent of Congress to help longshoremen, to distinguish between liability to longshormen (employee) injured under precisely the same circumsta nces because some draw their pay directly from a shipowner (employer) and others from a stevedoring company doing the ship's service (third party). Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company (third party). As we said in a slightly different factual context, "All were subjected to the same danger. All were entitled to like treatment under law." (. 1353)

United States Steel Corporation has not disputed that public policy requires land owners to

remedy defects on their premises and requires producers-manufacturers to correct defects in dangerous products they produce. It is clear that if this responsibility is to exist at all, it must be placed upon the owner or the producer-manufacturer. Certainly, the employee is not in a position to make the necessary repairs or corrections. UNITED STATES STEEL CORPORATION has wholly failed to demonstrate how they are justified in maintaining the hazardous instrumentality and defeating this action by the mere fortuitous circumstance that it happens to also be the employer of the person injured.

To bar the employee's suit under the described circumstances means that the worngful conduct of UNITED STATES STEEL CORPORATION would go unpunished. Such a holding would encourage the employer to be indifferent to the employee's plight in seeking a safe and healthy place to work. If a property owner and producer-manufacturer tortfeasor is shielded from the consequences of his culpability in one capacity because he happens to occupy the separate capacity as employer in a second relationship with the injured person, he has little or no incentive to correct the condition which caused the injury.

Appellant's Brief demonstrated that UNITED STATES STEEL CORPORATION would go entirely free in this matter if this action is held to be barred by the exclusive remedy provision of the Workmen's Compensation Act. Since there are other third party Defendants in this action from which Plaintiff may obtain recovery, UNITED STATES STEEL CORPORATION, pursuant to Indiana statute, would be entitled to subrogation rights as against any recovery from such other third parties to the extent of any compensation payments made. The net result would be that UNITED STATES STEEL CORPORATION will have paid nothing as a result of their tortious conduct which caused the death of Plaintiff's Decedent. UNITED STATES STEEL CORPORATION has not, and indeed cannot, advance any public policy argument to justify such an absurd and incongruous result.

It is clear that UNITED STATES STEEL CORPORATION'S position in this lawsuit is based upon the literal wording of the statute containing the exclusive remedy provisions. This was the same argument advanced by the employer in the Reed v. Steamship Yaka case. The United States Supreme Court flatly rejected said argument.

Plaintiff submits that the Court must be mindful of public policy considerations when determining the legislative intent behind particular statutory provisions. Especially is this true when the Court is called upon to determine the applicability of the exclusive remedy provisions to a Plaintiff seeking relief against a property owner and producer-manufacturer. The dominent purpose of the Workmen's Compensation Act was to provide benefits to employees, not to provide a protective shield to employers and particularly not as to duties and responsibilities existing apart from the employment relationship.

Lastly, there can be no questions but that the Petitioner can properly argue on appeal that UNITED STATES STEEL CORPORATION was the producer-manufacturer of the dangerous instrumentality in question. In granting summary judgment, the District Court made findings of fact to the effect that UNITED STATES STEEL CORPORATION did not manufacture or design the hinged door grating devices in question which caused the death of Plaintiff's decedent. However, UNITED STATES STEEL CORPORATION gave the following responses to Interrogatory No. 16 submitted to them by the Plaintiff and filed with the Court on September 8, 1975:

16. Regarding the hinged door grating that failed and through which the decedent fell to his death, please give the following information:

* * *

b.) The corporation or division of U.S. Steel Corporation that installed it.

* * *

e.) Who produced, built, or manufactured the floor grating serving as a mount for the

crane lights on #5316 E.O.T. crane in #3 Steelyard?

Answer:
b.) This was a replacement grating installed by employees of U.S. Steel Corporation.

* * *

e.) U.S. Steel Corporation purchased the grating and cut it to size. We do not know from whom this particular grating was purchased.
(No. 32, Def's. Ans. to Interrogatories at p. 3)

The above response made by United States Steel Corporation to Plaintiff's Interrogatory #16 leaves considerable doubt as to the role that UNITED STATES STEEL CORPORATION played in designing, manufacturing, installing, or testing the dangerous instrumentality in question which caused the death of Plaintiff's decedent. It appears very clearly that at least a replacement grating was installed by employees of UNITED STATES STEEL CORPORATION. It further appears that employees of UNITED STATES STEEL CORPORATION purchased grating and cut it into size, therefore leading credence to Plaintiff's contention that they designed and produced the instrumentality in question. Under the circumstances, it is clear that a material issue of fact existed as to whether UNITED STATES STEEL CORPORATION or American Bridge, a division of UNITED STATES STEEL CORPORATION, manufactured, designed, produced, installed or inspected the hinged door grating device in question. It was, therefore, improper for the District Court Judge to determine that the instrumentality in question was not produced, manufactured, designed, etc., by UNITED STATES STEEL CORPORATION, American Bridge Company, Inc. or any of their employees, agents or representatives.

And applying the provisions of Trial Rule 56(c) of the Federal Rules of Civil Procedure as they relate to the granting of summary judgment, this Court in United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, (1962) stated as follows:

> On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.

See also Adicks v. S. H. Kress & Co. (1970) 398 U.S. 144, 90 S. Ct. 1598.

In National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 305 F. 2d 647, The Court stated:

> The law is well settled then in order to entitle the moving party to summary judgment, it must be clearly shown: (1) that there is no genuine issue to any material fact in the case; and (2) that he is entitled to a judgment in his favor as a matter of law. The rule should be invoked cautiously in order to allow a full trial where there is a bona fide dispute of facts between the parties.
>
> Summary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and it is not the purpose of the rule to deny two litigants the right of trial if they really have issues to try. It is no part of the duty of the Court to decide factual issues, but only to determine whether there are factual issues to be tried.
>
> The moving party has the burden of positively and clearly demonstrating that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him. The long line of cases have held that summary judgment should not be granted if there is the 'slightest doubt' as to the facts; which is actually another way of stating that there is no genuine issue as to any material fact. The fact that it may be surmised that the party against whom the motion is made is unlikely to

prevail at the trial is not sufficient to authorize summary judgment against him. The burden is heavy on the moving party to establish his right to summary judgment.

Numberous other citations can be found indicating that caution has to be exercised in granting summary judgment. For example, see Devex Corporation v. Moudaille Industries, Inc., 7 Cir., 382 F. 2d 17, 21; Technograph Printed Circuits, Ltd. v. Method Electronics, Inc., 7 Cir., 356 F. 2d 442, 446.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted. While this may not be the typical kind of case in which this honorable Court would grant Certiorari, it is submitted that, to America's working class people, the issue is extremely important and urgently in need of this Court's review. This is an unexcelled opportunity for this Court to interpret the law in a manner as will promote justice and equity while yet remaining well within the legal precedent considering the question. The issue to be decided is of first impression in the state of Indiana and the Court of Appeals for the Seventh Circuit. Further it is believed that no other decisions in other circuits of the United States Court of Appeals have directly considered this question. The precedent to be set in this case by reason of the lower Court's decision, if not reviewed by this Court, will have a devastating effect upon the personal rights and freedoms of America's laborers.

LUCAS, CLIFFORD, KANE &
HOLCOMB

By: Robert F. Peters
Robert F. Peters

James A. Holcomb
James A. Holcomb
Attorneys for Petitioner
1000 E. 80th Place
Merrillville, IN 46410
Phone: 769-3561 (219)

A_P_P_E_N_D_I_X

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis	)	
Plaintiff	)	
-vs-	)	No. H75-194
UNITED STATES STEEL CORPORATION; ALLIANCE MACHINE COMPANY, a corporation; and EICHLEAY CORPORATION	)	
Defendants	)	

ORDER

On December 24, 1975, the Defendant, United States Steel Corporation, filed a motion for summary judgment supported by an extensive memorandum and attachments in support thereof. On January 16, 1976, the Plaintiff filed a response thereto to which the Plaintiff filed an additional brief.

While the parties and their very able counsel have given the Court a mass of paper and cited a mass of authorities the question to be decided is of relevant simplicity and on the basis of the record before the Court is relevantly easy to decide. Given all of the inferences in favor of the Plaintiff, it is this Court's conclusion that on the basis of the record before it the Defendant, United States Steel Corporation, is entitled to a judgment as a matter of law on the basis of North v. United States Steel Corporation, 495 F. 2d 810 (7th Cir. 1974). North appears to be the last word from our Court of Appeals on this subject and is completely determinative of the so-called issue of dual capacity.

Exhibit "A"

Since the Defendant, United States Steel Corporation, is entitled to a judgment as a matter of law its motion for summary judgment is now GRANTED and counsel for United States Steel is requested to submit a form of judgment together with suggested findings of fact and conclusions of law no later than March 1, 1976.

Enter February 10, 1976.

/s/ Allen Sharp
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CONSTANCE KOTTIS, as Admrx. of the Estate of Christos Kottis, Plaintiff,	)	
-vs-	)	Civil No. H75-194
UNITED STATES STEEL CORP., et al, Defendants.	)	

ORDER OF JUDGMENT

The Court having reviewed Plaintiff's Amended Complaint, the pleadings, discovery and Affidavits submitted by both parties upon the Motion for Summary Judgment of Defendant, United States Steel Corporation, now finds that there is no genuine issue as to any material fact and that said Defendant is entitled to judgment in its favor as a matter of law upon all counts of Plaintiff's Amended Complaint. The Court's determination is based on the following findings of fact and conclusions of law.

Accordingly, the Court now GRANTS the Motion for Summary Judgment of Defendant, United States Steel Corporation, and orders that judgment be entered in favor of Defendant, United States Steel Corporation, and against the Plaintiff and that Plaintiff take nothing by her complaint against said Defendant.

Enter: February 25, 1976.

/s/ Allen Sharpe
JUDGE, United States District Court

FINDINGS OF FACT

The Court now finds that there is no genuine issue regarding the following facts.

1. On November 18, 1974, Plaintiff's decedent, Christos Kottis, was employed as a craneman by the Defendant, United States Steel Corporation, at its Gary-Ellwood Works in Gary, Indiana.

2. While Christos Kottis was so employed with the Defendant, United States Steel Corporation and performing his duties as a craneman for United States Steel Corporation assigned to No. 5316 E.O.T. crane, he was involved in an accident which resulted in his death.

3. On approximately July 15, 1975, the dependents of Christos Kottis, namely Constance Kottis, Nick Kottis, and Kristine Kay Kottis, entered into a Form 13 Agreement Between the Dependents of a Deceased Employee and the Employer as to Compensation with United States Steel Corporation stating that Christos Kottis was an employee of United States Steel Corporation; that his death resulted from an accident arising out of and in the course of his employment with Defendant, United States Steel Corporation; and that the provisions of the Indiana Workmen's Compensation Act applied to this accident.

4. The Industrial Board of Indiana approved the Form 13 Agreement on July 24, 1975, which Agreement recites by its terms that it is final and binding upon the parties.

5. Based on the fact that the dependents of Christos Kottis received workmen's compensation, it can be concluded that both United States Steel Corporation and Christos Kottis had elected to be covered by the provisions of the Indiana Workmen's Compensation Act.

6. On September 8, 1975, Constance Kottis filed on behalf of the Estate of Christos Kottis a

wrongful death action against United States Steel Corporation, the employer, based on the November 18, 1974, accident.

7. Plaintiff's Amended Complaint filed December 1, 1975, alleged in Count I that the employer, United States Steel Corporation, was also the owner of the real estate known as Gary Tube Works and that it was liable as a landowner for maintaining a hazardous and unsafe condition on No. 5316 E.O.T. crane located on its land. In Count II, Plaintiff alleged that the employer, United States Steel Corporation, and other Defendants were liable on a theory of products liability as manufacturers and designers of a certain hinged door grating device on No. 5316 E.O.T. crane which was allegedly defective. Count III alleges that American Bridge Company, Inc. manufactured and designed the hinged door grating device on No. 5316 E.O.T. crane prior to its merger with United States Steel Corporation. Plaintiff claims that United States Steel Corporation and American Bridge Co., Inc. should be maintained as separate entities to maintain the third party action but that United States Steel Corporation should be liable for any judgment against American Bridge Co., Inc. Count IV alleges that the employer, United States Steel Corporation, is liable for willful and wanton conduct, having been given notice of a violation of U. S. Occupational Safety and Health Act regulations with regard to No. 5316 E.O.T. crane and failing to correct the violations.

8. United States Steel Corporation purchased No. 5316 E.O.T. crane from Alliance Machine Company on October 1, 1948. The crane was manufactured, designed and built by Alliance Machine Company. None of the agents, servants or employees of the American Bridge Company, Inc. either manufactured or designed the hinge door grating devices on No. 5316 E.O.T. crane or had any responsibility with regard to the design, modification, testing, inspection, fabricating and manufacturing of this crane.

9. The U. C. Occupational Safety and Health Administration did not inspect No. 5316 E.O.T. crane prior to November 18, 1974.

CONCLUSIONS OF LAW

1. On November 18, 1974, Plaintiff's decedent, Christos Kottis, was fatally injured as a result of an accident which arose out of and was within the course and scope of his employment with his employer, United States Steel Corporation.

2. The accident of November 18, 1974, was compensable within the provisions of the Indiana Workmen's Compensation Act.

3. The Indiana Workmen's Compensation Act provides that the rights and remedies herein granted to an employee subject to this Act on account of personal injury or death by accident should exclude all other rights and remedies of such employee, his personal representative, dependents or next of kin at common law or otherwise, on account of such injury or death.

4. The Indiana Workmen's Compensation Act allows third party actions by the employee whenever injury or death for which compensation is payable under this Act shall have been sustained under circumstances creating in some other person than the employer and not in the same employe a legal liability to pay damages in respect thereto, the injured employee or his dependents, in case of death, may commence legal proceedings against such other person to recover damages.

5. The rights and remedies of the Indiana Workmen's Compensation Act are sole and exclusive of all other rights and remedies, at common law or otherwise which an employee may have against an employer for injuries arising out of the employee's employment.

6. The exclusive remedy and thrid party action provisions of the Indiana Workmen's Compensation Act

bar any other actions by the Plaintiff against the employer, United States Steel Corporation, in any capacity for the accident of November 18, 1974, which accident was compensable under the provisions of the Act.

7. The Indiana Workmen's Compensation Act bars the action under Count I of Plaintiff's Amended Complaint against the Defendant, United States Steel Corporation, on any theory of violation of common law duties as landowner for the accident of November 18, 1974.

8. Under Count II of Plaintiff's Amended Complaint the Defendant, United States Steel Corporation, cannot be held liable as a manufacturer or designer of any part of No. 5316 E.O.T. crane in a third party action by Plaintiff as a result of the accident of November 18, 1974.

9. Under Count III of Plaintiff's Amended Complaint the Defendant, United States Steel Corporation cannot be liable to Plaintiff because American Bridge Co., Inc. was not in any manner connected with the manufacture or design of No. 5316 E.O.T. crane or the hinged trap door grating which Plaintiff claims caused the accident.

10. Count IV of Plaintiff's Amended Complaint alleging intentional willful, wanton and grossly negligent conduct by Defendant, United States Steel Corporation, which caused the accident of November 18, 1974, cannot be maintained on the facts alleged since no U.S.O.S.H.A. inspections were made of No. 5316 E.O.T. crane before the accident which gave United States Steel Corporation notice of a safety violation. In addition, the exclusive remedy provisions of the Indiana Workmen's Compensation Act bar any third party action against the employer, United States Steel Corporation, for alleged willful and wanton conduct resulting in a compensable accident. North v. U.S. Steel Corporation, 495 F. 2d 810 (7th Cir. 1974).

11. The employer, United States Steel Corporation, does not have a dual legal capacity such that the employee can recover workmen's compensation benefits from the employer and also maintain a third-party action against the employer on some other theory for an accident which arose out of and in the course of the employee's employment.

Enter: February 25, 1976.

/s/ Allen Sharp
Judge, U. S. District Court

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1400

CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis,

Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. H 75 C 194 — **Allen Sharp**, *Judge.*

ARGUED SEPTEMBER 17, 1976 — DECIDED OCTOBER 18, 1976

Before FAIRCHILD, *Chief Judge*, CUMMINGS and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* We are asked by the plaintiff-appellant in this diversity case to hold that the Indiana Workmen's Compensation Act does not provide the exclusive remedy for injury or death incurred in the course of and in the scope of employment when the employer is in a "dual capacity," *i.e.*, is both the employer and also the owner of the land, or also the manufacturer of defective equipment, on which the accident occurred. We agree with the District Court that the Act provides the exclusive remedy and therefore affirm a summary judgment in favor of the defendant.

Plaintiff's decedent, Christos Kottis, was killed while performing his duties as a craneman employed by defendant United States Steel Corporation in its plant in Gary, Indiana. It is undisputed that the accident arose out of and in the course of his employment, and that therefore the Indiana Workmen's Compensation Act, Ind. Ann. Stat. § 22-3-2-1, *et seq.*, was applicable. Kottis' dependents have entered into a settlement agreement pursuant to which they are receiving benefits under the Act.

The administratrix of Kottis' estate brings this action against the employer on a "dual-capacity" theory to recover damages in addition to the workmen's compensation benefits. In her amended complaint she alleges that United States Steel was not only Kottis' employer but also occupied two other capacities, *viz.*, owner of the land and manufacturer of the crane on which the accident occurred. The theory on which she bases her claim is that, as a landowner, United States Steel owed Kottis the same duty to exercise reasonable care to discover defects or dangerous conditions on the premises that it owed other invitees, and, as a manufacturer, it may be held liable for defects in its product. The amended complaint also names two other defendants, Alliance Machine Company and Eichleay Corporation, who are alleged to have participated in the manufacture and installation of the equipment, and against whom the action is still pending in the District Court. The District Court entered summary judgment for defendant United States Steel and made the direction and finding necessary to make that judgment appealable under Rule 54(b), Fed. R. Civ. P. Although plaintiff argues several points, the only one we need to reach is whether the workmen's compensation remedy is exclusive.[1]

[1] In its order the District Court, after holding that the workmen's compensation remedy was exclusive, went on to find that United States Steel was not the manufacturer of the equipment. Plaintiff argues that summary judgment on this issue was error because there was a genuine issue of fact as to who manufactured the crane and also because she had been unable to uncover all the facts due to defendant's failure to cooperate with her discovery requests. These arguments are made academic by our holding that the workmen's compensation remedy is exclusive.

The Indiana Workmen's Compensation Act, Ind. Ann. Stat. § 22-3-2-6, provides as follows:

> "The rights and remedies herein granted to an employee subject to this act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death."

The Act reserves the remedy of the injured employee, or his dependents in case of death, against persons other than the employer and not in the same employ in the following language, Ind. Ann. Stat. § 22-3-2-13 (Supp. 1975):

> "Whenever an injury or death, for which compensation is payable under chapters 2 through 6 of this article [22-3-2-1 — 22-3-6-3] shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against such other person to recover damages. . . ."

The Indiana courts have repeatedly held that the remedy provided by the Act is exclusive. As Judge Beamer said in *Hickman v. Western Heating & Air Conditioning Co.*, 207 F.Supp. 832, 833 (N.D. Ind. 1962),

> "The rights and remedies granted to an employee subject to the Act on account of personal injury or death by accident are sole and exclusive of all other rights and remedies against the employer. . . . The Act specifically abolishes common law actions against an employer subject to its provisions." (Emphasis deleted.)

In a later opinion adopted by this court as its own and reported in *North v. United States Steel Corp.*, 495 F.2d 810, 813 (7th Cir. 1974), Judge Beamer stated:

> "The remedies of the act should extend to all situations where the employee would have his

> remedy at common law if there were no act, and the act should be so construed where its language reasonably permits such a construction, since the general purpose of the act was to substitute its provisions for pre-existing rights and remedies."

Accord, *Seaton v. United States Rubber Co.*, 223 Ind. 404, 411-412, 61 N.E.2d 177, 179-180 (1945); *In re Bowers*, 65 Ind.App. 128, 132, 116 N.E. 842, 843 (1917); *Burkhart v. Wells Electronics Corp.*, 139 Ind.App. 658, 662, 215 N.E.2d 879, 881 (1966); *Harshman v. Union City Body Co.*, 105 Ind.App. 36, 39-40, 13 N.E.2d 353, 354 (1938) (*in banc*); *Selby v. Sykes*, 189 F.2d 770, 773 (7th Cir. 1951); *Peski v. Todd & Brown, Inc.*, 158 F.2d 59, 60 (7th Cir. 1946).

Plaintiff's argument is that the third-party provision quoted above, Ind. Ann. Stat. § 22-3-2-13, should be interpreted to permit an action against the employer when the latter can be said to have a capacity, or a relationship to the plaintiff, in addition to that of employer. This argument does considerable violence to the statutory language, which abrogates "all other rights and remedies . . . at common law or otherwise, on account of such injury or death" except those against "some other person than the employer and not in the same employ." Plaintiff relies, however, upon *Reed v. The Yaka*, 373 U.S. 410 (1963), in which the Supreme Court of the United States held that similar provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, did not bar a longshoreman from relying on his employer's liability, as shipowner *pro hac vice*, for the vessel's unseaworthiness to support his libel *in rem* against the ship. *Reed*, which Congress limited by amending 33 U.S.C. § 905, Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263, codified as 33 U.S.C. § 905(b) (Supp. 1972), does not of course control the interpretation to be given an Indiana statute by the courts of that state. The plaintiff also relies on scattered decisions in jurisdictions other than Indiana, the forerunner of which was *Duprey v. Shane*, 109 Cal.App.2d 586, 241 P.2d 78, *aff'd*, 249 P.2d 8 (1952), in which a chiropractor's

employee injured in the course of employment and treated by the chiropractor himself was permitted to sue him for malpractice.[2]

Plaintiff asserts that this dual-capacity theory has never been passed upon by the Indiana courts. Yet in the cases cited above, holding that the workmen's compensation remedy is exclusive, the courts applying the Indiana statute have consistently refused to permit actions based on other statutory or common-law duties arising in the course of the employer-employee relationship.[3] In those cases the public policy arguments

[2] Plaintiff also cites decisions from other states, which defendant distinguishes but which we are not in any event persuaded Indiana courts would follow. *Costanzo v. Mackler*, 34 Misc. 2d 188, 227 N.Y.S.2d 750, *aff'd*, 17 App. Div. 2d 948, 233 N.Y.S.2d 1016 (1962); *Marcus v. Green*, 13 Ill. App. 3d 699, 300 N.E.2d 512 (5th Dist. 1973); *Mazurek v. Skaar*, 60 Wis. 2d 420, 210 N.W.2d 691 (1973). The cases that can be said to involve a dual-capacity theory in some form are not in agreement. See 2A Larson, *Workmen's Compensation Law* § 72.80 (1976); Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 5 St. Mary's L.J. 818 (1974).

[3] For example, in *Harshman v. Union City Body Co., supra*, 105 Ind.App. 36, 13 N.E.2d 353, the court held that the exclusive remedy provision of the Act barred a suit based on common-law negligence and a violation of the Employers' Liability Act where an employee had been injured while operating a machine in his employer's plant. Accord, *Selby v. Sykes, supra*, 189 F.2d 770 (employee injured while repairing a roof on employer's premises suing on basis that employer's failure to take safety precautions violated the Dangerous Occupation Act, Ind. Ann. Stat. § 20-303); *North v. United States Steel Corp., supra*, 495 F.2d 810 (employee injured when equipment collapsed while he was working as crane operator suing on basis that employer's faulty design and operation of shop violated Employers' Liability Act, Ind. Ann. Stat. § 40-1206). See also *Reunion v. Indiana Glass Co.*, 105 Ind. App. 650, 16 N.E.2d 961 (1938) (*in banc*) (suit based on employer's negligence and violation of Employers' Liability Act); *Pearson v. Rogers Galvanizing Co.*, 115 Ind.App. 426, 59 N.E.2d 364 (1945) (*in banc*) (suit based on employer's wilful and wanton misconduct in failing to provide safety device for hoist that came off track and fell on employee); *Markham v. Hettrick Manufacturing Co.*, 118 Ind.App. 348, 79 N.E.2d 548 (1948) (*in banc*) (suit based on violation of Factory Act).

plaintiff advances have also been consistently rejected. For example, plaintiff argues that she should be able to sue the employer in its capacity as landowner because she would have been able to sue a landowner who was not her husband's employer. Yet in *Peski v. Todd & Brown, Inc., supra*, 158 F.2d at 60, this court held that the exclusive remedy provision of the Act barred a common-law action against an employer operating an employee bus service when an employee was killed on his way to work, even though a third-party carrier under contract to the employer would have been liable under the same circumstances. Plaintiff also argues that applying the exclusive remedy provision here will shield the defendant from the larger liability it assumed as owner of the land. But in *Burkhart v. Wells Electronics Corp., supra*, 139 Ind.App. at 662, 215 N.E.2d at 881, the Indiana Appellate Court rejected an identical argument with respect to an employer's liability for the intentional torts of its employees committed within the scope of their employment.

Whatever may be said, when the specific statutory language permits, for allowing a remedy in addition to workmen's compensation in cases such as *Duprey v. Shane, supra*,[4] in which the employment relationship is incidental to the injury, we see no basis for granting such a remedy here, where the employment relationship predominates. The injury to plaintiff's decedent was precisely the kind of injury the Workmen's Compensation Act was intended to cover. It occurred while he was performing his job in his employer's steel mill using equipment provided by the employer to perform that job. Failure of the employer to provide a safe place to work is the cause, or can plausibly be alleged to be the cause, of a substantial proportion of industrial accidents. It was one of the most important grounds for master-servant actions at common law, *e.g.*, 1 Larson,

[4] Or in the case hypothesized in plaintiff's brief of the employee of an automobile manufacturer who buys an automobile manufactured by his employer which contains a hidden defect and, while driving the car in the course of his employment, suffers injury as a result of that defect.

Workmen's Compensation Law, § 4.40 at 28 (1976), which the workmen's compensation remedy was designed to replace. Allowing a remedy in addition to workmen's compensation for such cases would make substantial, if not devastating, inroads on the Indiana workmen's compensation scheme. If a development having such important and far-reaching implications is to occur despite the language of the statute and the consistent pattern of decisions outlined above, its author should be a court of the State of Indiana, not a federal court, whose duty is to apply state law as it appears to have been laid down by the courts of the state.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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I.C. 22-3-2-6. The rights and remedies herein granted to an employee subject to this act... on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, common law or otherwise, on account of such injury or death.

I.C. 22-3-2-13. Whenever an injury or death, for which compensation is payable...shall have been sustained under circumstances creating in some other person other than the employer and not in the same employ, a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against such other person to recover damages notwithstanding such employer's or such employer's compensation insurance carrier's payment of or liability to pay compensation under Chapters 2 through 6 of this article....

Exhibit "C"

No. 76-991

In the
Supreme Court of the United States
OCTOBER TERM, 1976

CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES E. McHIE
53 Muenich Court
Hammond, Indiana 46320
Phone: (219) 931-1700
Counsel for Respondent.

G. EDWARD McHIE
53 Muenich Court
Hammond, Indiana 46320
Phone: (219) 931-1700
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-991

CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPLICABLE STATE STATUTES

The questions raised upon petitioner's Petition for Writ of Certiorari involve the interpretation and application of the following provisions of the Indiana Workmen's Compensation Act:

> "*Indiana Code (I.C.) 22-3-2-6.* The rights and remedies herein granted to an employee subject to this Act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives,

dependents, or next of kin, at common law or otherwise, on account of such injury or death. . . ."

"*Indiana Code (I.C.) 22-3-2-13.* Whenever an injury or death for which compensation is payable under chapters 2 through 6 of this Article (22-3-2-1 through 22-3-6-3) shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents in case of death, may commence legal proceedings against such other person to recover damages. . . ."

QUESTIONS PRESENTED FOR REVIEW

Christos Kottis, while employed as a craneman by United States Steel Corporation [hereinafter referred to as "U. S. Steel"] and in the course and scope of his employment, suffered a fatal injury on an overhead crane located on the premises of U. S. Steel. The dependents of Christos Kottis, including Petitioner herein, entered into an agreement with U. S. Steel which provided that the injury was subject to the Indiana Workmen's Compensation Act and that the dependents were entitled to compensation thereunder. This agreement was filed with and approved by the Industrial Board of Indiana and by its terms was final and binding on the parties.

Subsequently, Petitioner brought a common law action against the employer, U. S. Steel, to recover damages for the fatal injury. The United States District Court for the Northern District of Indiana, Hammond Division, granted summary judgment in favor of U. S. Steel holding that Petitioner's action against the employer was barred by the provisions of the Indiana Workmen's Compensation Act. The Court of Appeals for the Seventh Circuit affirmed the decision of the District Court without dissent.

The questions presented for review are:

A. Whether the personal representative of an employee having applied for and received workmen's compensation from the employer under the provisions of the Indiana Workmen's Compensation Act is then entitled to maintain a third party action against the employer for the same injury in derogation of the exclusive remedy and third party action provisions of the Indiana Workmen's Compensation Act which provide that the sole remedy against the employer shall be workmen's compensation.

B. Did the District Court err in finding that the crane was manufactured, designed and built by Alliance Machine Company and purchased by U. S. Steel, and, if so, was such error harmless because the Indiana Workmen's Compensation Act bars any third party action against the employer on a theory of products liability for an injury compensable under that Act?

C. Did the Court err in refusing to grant relief under Rule 56(F) of the Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

I. The Background.

Petitioner's decedent, Christos Kottis, was employed as a craneman by Respondent, U. S. Steel, at its Gary Ellwood Works, Gary, Indiana. On November 18, 1974, while Christos Kottis was so employed and performing his duties as a craneman assigned to #5316 E.O.T. crane located on the premises of U. S. Steel, he suffered a fatal injury.

On approximately July 15, 1975, the dependents of Christos Kottis, including Petitioner herein, entered into a Form 13 Agreement stating that Christos Kottis was an employee of U. S. Steel; that his death resulted from an accident arising out of and in the course of his employment; and that the provisions of the Indiana Workmen's Compensation Act applied to this accident. The Industrial Board of Indiana approved the Form 13 Agreement which recites by its terms that it is final and binding upon the parties.

The crane in question was purchased by U. S. Steel from Alliance Machine Company on October 1, 1948. It was designed and built by Alliance Machine Company. The only other entities which in any manner assisted Alliance Machine Company in the design, fabrication, manufacture or production, assembly or installation of hinged door grating devices of #5316 E.O.T. crane were Alliance Structural Fabrication and Eichleay Corporation. Since the purchase of the crane, U. S. Steel has performed normal maintenance on the crane when needed, including replacement of worn out parts such as the steel grating. This maintenance was performed in the ordinary course of the business operations of U. S. Steel. The design was still that of Alliance Machine Company.

II. The History of the Case.

On September 8, 1975 Petitioner brought a third party action against the employer, U. S. Steel. A subsequent Amended Complaint was filed on December 1, 1975 naming Alliance Machine Company and Eichleay Corporation as additional defendants. The Amended Complaint alleged, among other things, that Christos Kottis was only a business invitee on the premises and that U. S. Steel

was liable as a landowner of the premises. Petitioner also alleged that U. S. Steel was liable as the manufacturer and designer of part of #5316 E.O.T. crane.

On December 24, 1975 U. S. Steel filed its Motion for Summary Judgment alleging that Petitioner was barred from maintaining a third party action against the employer, U. S. Steel. At the same time U. S. Steel filed its Motion for Protective Order Pursuant to Rule 26(c) requesting that discovery be limited to the issues raised by the Motion for Summary Judgment until the court ruled on the motion.

The District Court granted the Motion for Summary Judgment holding as a matter of law that the exclusive remedy and third party action provisions of the Indiana Workmen's Compensation Act barred any third party action against U. S. Steel. The only facts necessary to reach that conclusion were indisputably established when Petitioner admitted that Christos Kottis was employed by U. S. Steel and was injured in the course and scope of his employment.

On February 25, 1976 the District Court entered final judgment in favor of U. S. Steel.

The Court of Appeals for the Seventh Circuit affirmed the decision of the District Court on October 18, 1976 without dissent holding that the third party action against U. S. Steel was barred and that its ruling on that issue made all other issues academic.

ARGUMENT

I. Indiana law has consistently interpreted the Indiana Workmen's Compensation Act to bar any third party action against the employer.

Petitioner seeks to justify review by this Court on two grounds. The first ground is that this is an important question of first impression. Secondly, Petitioner claims that the decision in the court below is not in accord with an alleged rule of statutory construction as set forth in *Reed* v. *The Yaka,* 373 U.S. 410 (1963). Neither of these assertions are justified.

The decisions below in the present case have become the most recent additions to a long line of cases both in the courts of Indiana and the Federal courts which have consistently and uniformly interpreted the exclusive remedy and third party action provisions of the Indiana Workmen's Compensation Act to bar third party actions against employers by employees for injuries suffered in the course and scope of employment. This interpretation is consistent wtih the plain language and intent of the Act.

Indiana Code 22-3-2-6 provides in part that:

> "The rights and remedies herein granted to an employee subject to this Act . . . shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death. . . ."

Pursuant to this statute, it is conclusive that the rights and remedies provided by the Indiana Workmen's Compensation Act on account of an injury arising out of and

in the course of employment are sole and exclusive of all other rights and remedies, at common law or otherwise, against the employer. An uninterrupted line of Indiana decisions has consistently upheld this conclusion in a variety of situations.

> "The rights and remedies afforded by the Act . . . shall extend to all situations wherein, were there no Workmen's Compensation Act, an injured employee would have his remedy at common law for injuries received, and the Act should be so construed where its language reasonably admits to such construction, *the general purpose being to subsitute its provisions for pre-existing rights and remedies.*" (Emphasis added.)

In re: Bowers, 65 Ind. App. 128, 132, 116 N.E. 842 (1917); *Harshman* v. *Union City Body Co.,* 105 Ind. App. 36, 13 N.E. 2d 353 (1938) (*in banc*); *Runion* v. *Indiana Glass Co.,* 105 Ind. App. 650, 16 N.E. 2d 961 (1938) (*in banc*); *Pearson* v. *Rogers Galvanizing Co.,* 115 Ind. App. 426, 59 N.E. 2d 364 (1945) (*in banc*); *Seaton* v. *U. S. Rubber Co.,* 223 Ind. 404, 61 N.E. 2d 177 (1945); *Markham* v. *Hettrick Mfg. Co.,* 118 Ind. App. 348, 79 N.E. 2d 548 (1948) (*in banc*); *Stainbrook* v. *Johnson Co. Farm Bureau,* 125 Ind. App. 487, 122 N.E. 2d 548 (1948); *Burkhart* v. *Wells Electronics Corp.,* 139 Ind. App. 658, 215 N.E. 2d 879 (1966).

This question is not one of first impression for the Federal courts either. The Federal courts in interpreting Indiana law as set forth by the courts of that state have also consistently held that a third party action cannot be maintained against an employer for an injury subject to the provisions of the Indiana Workmen's Compensation Act. In *Hickman* v. *Western Heating & Air Conditioning Co.,* 207 F. Supp. 832 (N.D. Ind. 1962) the Court stated:

"The Workmen's Compensation Act provides that an employer bound by the Act shall be liable to any employee and his dependents for personal injury or death by accident arising out of and in the course of employment only to extent and manner specified in the Act. Burns Ann. Stat. 40-1205 (1962 Cum. Supp.) The rights and remedies granted to an employee subject to the Act on account of personal injury or death by accident are *sole and exclusive of all other rights and remedies against the employer.* Burns Ann. Stat. §40-1206 (1962 Cum. Supp.) In oher words, if an employer is subject to, and bound by the Act, an employee may seek recourse for injuries arising out of and in the course of employment only by proceeding before the Industrial Board of Indiana as prescribed by the Act. *The Act specifically abolishes common law actions against an employer subject to its provisions.*" *Id.* at 883-34. (Emphasis added)

Again in *Wilson* v. *Lehigh Safety Shoe Co.*, U.S. District Court, N.D. Ind. Civil No. 69 H 15 (App. 5-A), the District Court in an unreported decision specifically considered and rejected the dual capacity rhetoric. In that case the plaintiff, an employee of Bethlehem Steel Corporation and while so employed, was injured when a steel slab fell on his foot. Plaintiff filed suit on a theory of products liability against Lehigh Safety Shoe Company, the manufacturer of the metatarsal shoes he was wearing, and Bethlehem Steel Corporation as the retailer, since the shoes were purchased at a company store. Plaintiff argued he was entitled to maintain the action against the employer because of the dual capacity relationship of buyer-seller. (App. 1-A). The District Court rejected this argument citing *Peski* v. *Todd & Brown, Inc.*, 158 F. 2d 59 (7th Cir. 1946) which stated:

> "The Act provides by its own terms that the remedy shall be exclusive. Burns Ind. Stat., Sec. 40-1206. We think this means that where the employer is liable under the Act . . . the Act must furnish the exclusive remedy as to him, regardless of the fact, that if a third party were also liable, the employee might have the option to elect whether to proceed against him or the third party." *Id.* at 60.

On at least three previous occasions the Court of Appeals for the Seventh Circuit has been called on to determine whether a third party action could be maintained against an employer for an accident subject to the provisions of the Indiana Workmen's Compensation Act. On all three occasions the Court has held the third party action barred as to the employer. In *Peski* v. *Todd & Brown, Inc.*, 158 F. 2d 59 (7th Cir. 1946) plaintiff's decedent was killed in an accident while he was a passenger on a bus owned and operated by his employer for the transportation of employees to work. Plaintiff sued the employer for negligence in the operation of the bus and the question was whether the employer could also be liable at common law as the owner and operator of the bus. The Court found that the employee did not have both a common law remedy and a compensation remedy against the employer but one single exclusive remedy under the Compensation Act. As long as the employee was killed in an accident arising out of and in the course of his employment, with regard to that accident no other course of action can be maintained against the employer for ownership and operation of the bus. The Court followed this rule despite the fact that plaintiff would have had a third party action if someone other than the employer had owned and operated the bus.

In *Selby* v. *Sykes*, 189 F. 2d 770 (7th Cir. 1951) the plaintiff fell through a roof while engaged in his employ-

ment as a roofer. After obtaining workmen's compensation benefits, the plaintiff sued his employer claiming that the roof was in faulty condition and that the employer either knew or should have known of the faulty condition of the roof. The Court in rejecting plaintiff's argument that he could maintain an additional action against his employer for a dangerous condition cited the exclusive remedy provision and third party action provision of the Indiana Workmen's Compensation Act and held that so long as the accident arose out of and in the course of his employment, the employee had no other remedy against the employer based on a dangerous condition on the premises.

The most recent case in which a version of the dual capacity argument was rejected is *North* v. *United States Steel Corporation,* 495 F. 2d 810 (7th Cir. 1974). In *North* the plaintiff was injured when piping collapsed and hit him while he was working as an overhead crane operator. Plaintiff sued his employer for failure to provide a safe place to work and specifically for knowing that a dangerous condition existed on the premises. In *North,* the Court in rejecting plaintiff's argument stated that:

> "The Compensation Act specifically abolishes common law actions against an employer subject to its provisions . . . the remedies of the Act shall extend to *all situations where the employee would have his remedy at common-law if there were no Act,* and the Act should be so construed where its language reasonably permits such construction, since the general purpose of the Act was to substitute its provisions for pre-existing rights and remedies. *In re Bowers,* 65 Ind. App. 128, 116 N.E. 842 (1917)."

In the courts below and in this Court Petitioner has also advanced various public policy arguments in an

attempt to show that the decision appealed from is erroneous. However, these arguments scrupulously avoid any reliance on the public policy which gave rise to the passage of the Indiana Workmen's Compensation Act and which formed the basis for the specific statutory mandate that employers are not subject to third party actions.

Prior to the passage of the Indiana Workmen's Compensation Act, and indeed, most compensation acts, an injured employee faced sometimes inexorable obstacles to recovery. Even assuming he could prove negligence of the employer and avoid the common law defenses of contributory negligence, assumption of risk and the fellow-servant rule, he would inevitably face several years of litigation without any means of support, large attorney fees and various other expenses associated with litigation. According to one source, between seventy and ninety-four percent of all employees who sought to recover under the common law for injuries arising out of their employment received nothing. *Schneider's Workmen's Compensation Law,* Vol. 1, Sec. 1 (Perm. ed. 1971).

The Indiana Workmen's Compensation Act, like other compensation acts, addressed the situation and removed the obstacles faced by employees in a compromise statutory scheme. *See generally, Blair, E.N., Reference Guide to Workmen's Compensation Law,* Chapter 1, Section 1:00 (1971). The nature of the compromise is obvious. The employee is given a right to compensation irrespective of fault on either party, *Kinzie* v. *General Tire and Rubber Company,* 235 Ind. 592, 134 N.E. 2d 212, 216 (1956), and the employers' liability is limited to the benefits in the Act. *Hibler* v. *Globe Am. Corp.,* 128 Ind. App. 156, 147 N.E. 2d 19, 21 (1958). As stated in *North* v. *United States Steel Corp.,* 495 F. 2d 810 (7th Cir. 1974):

> "The purpose of the Workmen's Compensation Act was to remove obstacles and delays which had hindered the recovery of employees for injuries and to eliminate litigation. The employee was given a statutory right to compensation regardless of fault, and the employer's liability was limited to that provided in the Act." *Id.* at 813.

This legislative policy was further explained in *Stainbrook* v. *Johnson County Farm Bureau Co-op Assn.*, 125 Ind. App. 487, 122 N.E. 2d 884 (1954), where the Court stated:

> "In arriving at the intention of the legislature in the passage of section 6 of the act, we believe that section 6 substituted for the common law remedy a statutory proceeding by which an employer would be required to compensate those who suffer damage in industrial accidents regardless of fault on the part of the employer. The amount to be paid therefor to be fixed by the legislature, and, upon compliance with the Act, the employer was relieved of all further liability in the premises including rights of third parties.
>
> • • • •
>
> The employer and employee in this case elected to have their rights determined according to the terms of the Act. By so doing, the common law remedy in tort follows by reason of a statutory contract for compensation based not upon the principal of tort but upon remuneration regardless of fault to the injured employee. . . . This seems to us to be the rational consequence of a changed relationship by consent of the parties affected under the act whereby the employer becomes immune from liability for the tort in consideration of the payment of compensation at a statutory rate regardless of fault." Id. at 886-887.

The public policy benefits upon which the Indiana legislature based the Indiana Workmen's Compensation

Act have clearly been fulfilled in the present case. Petitioner was able to obtain benefits from U. S. Steel in an expeditious manner without resorting to litigation and regardless of fault on either party. In return, liability of U. S. Steel is limited to payment of compensation benefits. Petitioner conveniently ignores the fact that benefits have been paid when they were most needed rather than denied to some indefinite time in the future and even then only contingent upon proof of negligence and failure to establish common law defenses.

Petitioner argues that as a matter of public policy U. S. Steel should not be allowed to avoid liability by payment of totally inadequate relief by way of compensation benefits. The solution to inadequate benefits under the Act is not to judicially abrogate the intent and plain meaning of the Act and allow a third party action against the employer but to urge the Indiana legislature to increase the statutory rate of compensation to provide adequate relief. This is a legislative and not a judicial problem.

Petitioner further argues that public policy should not allow the employer to shield himself from civil liability by invoking the exclusive remedy provision of the Indiana Workmen's Compensation Act. This argument has previously been raised and specifically rejected. In *Burkhart* v. *Wells Electronic Corp.*, 139 Ind. App. 658, 215 N.E. 2d 879, 881 (1966), the Court stated:

> "As to appellant's objection that an application of our Workmen's Compensation Act would shield the employer from his larger civil liability in this case we need only look to *In Re: Bowers, et al.*, (1917) 65 Ind. App. 128, 132, 116 N.E. 842, where this Court in speaking of the wisdom of the act said: 'Respecting cases when an employee may be awarded compensation on account of injuries received, the act is broader

and more inclusive than the common law; that is, there are many cases wherein under the act an employee may be awarded compensation on account of injuries received, when in an action at common law, he could be denied relief."

It must be kept in mind that Workmen's Compensation is founded on a contractual relationship. If employers are required to pay compensation benefits in all situations, whether or not at fault, and, in addition, are subjected to litigation in common law actions in other capacities, then there is no benefit to them to maintain the contractual relationship. Employers would then favor exempting themselves from the Act since then they would only have to pay when they were at fault.

The public policy upon which the Indiana Legislature acted in establishing the statutory scheme clearly supports a denial of third party liability against the employer. This is the public policy which the statutory scheme was intended to accomplish. The arguments which Petitioner advances as public policy not only run counter to legislative policy sought to be achieved but in fact would negate that policy by requiring employers not only to pay compensation benefits in all cases but also to be subjected to potential tort liability in common law actions as a third party.

The preceding cases demonstrate clearly that the issue and its public policy considerations which are presented to this Court for review are not matters of first impression but have been decided on numerous occasions in a variety of fact situations both by the Indiana courts and the Federal courts applying Indiana law. These decisions as well as the one in the present case are consistent with the language, intent and public policy of the

Indiana Workmen's Compensation Act. It is true that the preceding cases do not use the label "dual capacity" but the argument is the same, could the employer also be liable as an owner and operator of a bus (*Peski*), and could the employer also be liable as the owner of a defective machine (*Harshman*). Without the label "dual capacity" Petitioner, in the present case is merely making the same argument by posing the question could U. S. Steel also be liable as a landowner for the violation of a landowner's duties and as a manufacturer of a product for violation of certain duties. The Court's conclusion in these cases is the same conclusion that has been reached in the present case. As long as the injury occurred within the course and scope of employment, any third party action against the employer in any capacity is barred whether it be owner of a bus, owner of a machine or owner of a building.

Petitioner has relied on various decisions from states other than Indiana to support her position. None of these cases involved the application of the Indiana statute in question. It is the responsibility of the Indiana courts to interpret and apply the laws of their own state. Once the Indiana courts have discharged that responsibility it is the duty of the Federal courts to interpret and apply state statutes consistent with the decisions of the courts of that state. The decisions of the Indiana courts have steadfastly and consistently denied third party actions against employers for workmen's compensation injuries. Reliance on decisions from other jurisdictions to reach a contrary result would involve a most inappropriate exercise of judicial power by the Federal courts. The Court of Appeals for the Seventh Circuit reached this conclusion when it stated that: "[p]laintiff also cites decisions from other states which defendant distinguishes

but which we are not in any event persuaded Indiana courts would follow." (App. p. xvii fn. 2).

The second basis relied on by Petitioner to justify review by this Court is that the decision reached defies a rule of statutory construction in *Reed* v. *Yaka,* 373 U.S. 410 (1963).

In the *Reed* case, the plaintiff was a longshoreman who was injured while engaged in loading a ship. He recovered compensation under the Longshoremen's and Harbor Workers Compensation Act against his employer and then filed an *in rem* action against the Steamship Yaka for violation of the obligation of seaworthiness of the vessel. Plaintiff's employer was operating the ship under a bareboat charter and hence was the person liable for unseaworthiness of the vessel. The Court, in a very obvious attempt to avoid abolishing the traditional, well established and unique doctrine of seaworthiness, followed a rather tortured argument based primarily on the unique status of the "traditional remedies of the sea" and completely avoided the specific language of the Longshoremen's Act to reach the result which it achieved. It is particularly important to note that the Court admitted that the literal language of the exclusive remedy provision of the Longshoremen's Act would preclude the action. The Court could avoid this result only by asserting that the congressional intent of the Act could not possibly have been to preclude suits under the "traditional, absolute, and nondelegable obligation of seaworthiness". The Court stated:

> "We have previously said that the Longshoremen's Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. We think it would produce a

> harsh and incongruous result, one out of keeping with the dominant intent of congress to help longshoremen . . . [to bar actions for unseaworthiness under the Longshoremen's Act]."

Id. at 453.

The *Reed* case is not applicable to the present case for several reasons. The primary reason was aptly stated by the Court of Appeals for the Seventh Circuit when it stated in its opinion below that "the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 . . . does not of course control the interpretation to be given an Indiana statute by the courts of that state." (App. p. xvi).

A second reason the *Reed* case is not applicable is that the Court's decision could not have been reached but for its interpretation of the presumed intent of Congress which ran contrary to the plain meaning of the exclusive remedy language. This interpretation was subsequently repudiated by Congress itself when it passed an amendment to the Longshoremen's Act which nullified the decision in *Reed* and, in effect, declared that the congressional intent was to have the exclusive remedy of the Longshoremen's Act preclude actions against an employer based on the doctrine of unseaworthiness. The amendment states:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring *an action against such vessel as a third party* in accordance with the provisions of Section 933 of this Title *and the employer shall not be liable to the vessel for such damages directly or indirectly* and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subject

section shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." (Emphasis Added)

33 U. S. Code § 905(b) (Supp. 1972).

The final reason that the *Reed* case is not persuasive authority in the present case to support a dual capacity argument is seen from the nature of the action itself. An action based on the unseaworthiness of a vessel is an *in rem* action against the vessel and not against any person. Therefore, the employee was not suing his employer in a dual capacity but was in effect suing a separate entity, namely the vessel itself. It was only indirectly through contractual arrangements that the employer would become liable to his employee as a result of a judgment against the vessel. The importance of this distinction is noted in the dissenting opinion in which Mr. Justice Harlan states:

> "Under a statute which was specifically written to include ship owners who employed their own dock workers, and which excluded liability at law *or in admiralty*, there is no room for concluding that an employer ship owner can be held liable to his own longshoreman employee for unseaworthiness. Indeed, the point is so clear that petitioner has had what I would have thought was the good sense not even to argue to the contrary. (He has instead based his argument wholly on the theory that the ship itself may be liable even in the absence of any underlying personal liability on the part of anyone."

Reed, supra at 454. Section 905(b) just cited above also specifically recognizes that the vessel is a separate entity and is itself the "third party" and not the employer in a dual capacity. The statute specifically states that "a person . . . may bring an action against such *vessel* as a *third party* . . . and the employer *shall not be liable to the vessel* for damages.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied by this court.

II. The District Court properly found that U. S. Steel was not a manufacturer or designer under a theory of products liability and even if such finding was error, it would be harmless in light of the exclusive remedy provision of the Indiana Workmen's Compensation Act.

Discovery from both U. S. Steel and Alliance Machine Company established that the crane in question was purchased by U. S. Steel from Alliance Machine Company approximately October 1, 1948. Alliance Machine Company, in cooperation with Eichleay Corporation and Alliance Structural Fabrication manufactured, designed and erected the entire crane between 1949 and 1950.

In the intervening years U. S. Steel performed routine maintenance on this crane in connection with its normal business operations. In connection with this maintenance, U. S. Steel purchased standard steel grating, cut it to size and merely replaced the old with the new. Replacement of worn-out parts as a part of maintenance does not make U. S. Steel liable in products liability action as a manufacturer or designer of a product as those terms are used in connection with products liability.

However, the holdings of the District Court and the Court of Appeals for the Seventh Circuit that the Indiana Workmen's Compensation Act barred a third party action against the employer on any theory makes the question of whether U. S. Steel was a manufacturer or designer under a theory of products liability moot.

III. The District Court did not err in denying petitioner relief under Rule 6(F) of the Federal Rules of Civil Procedure.

The primary basis upon which the District Court granted Respondent's Motion for Summary Judgment was that the provisions of the Indiana Workmen's Compensation Act bar any third party action against the employer, U. S. Steel, for injuries to its employee, Christos Kottis, from an accident arising out of and within the course of employment. In order to so hold, the District Court only had to factually determine whether Christos Kottis was an employee of U. S. Steel at the time of the accident and that the accident arose out of and was within the course of that employment. These facts were admitted by Petitioner on the record. U. S. Steel cannot conceive how any further discovery would in any manner alter these factual conclusions reached by the Court.

Under Rule 56 of the Federal Rules of Civil Procedure, Petitioner was also entiled to take depositions and to use these to oppose the Motion for Summary Judgment of U. S. Steel. Yet, despite all of Petitioner's protestations that she could not obtain crucial discovery from U. S. Steel, Petitioner never took a single deposition in the six month period from the time the original complaint was filed until the Order granting Summary Judgment. Nor did Petitioner ever request time to take depositions of employees of U. S. Steel who had knowledge of facts deemed relevant to the Petitioner. It seems incongruous that Petitioner can avoid what, in all probability, was the best, easiest and quickest method of obtaining whatever discovery she deemed relevant and then claiming that she had no way "to gain access to the necessary

information through pre-trial discovery procedures in order to oppose the Motion for Summary Judgment".

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Petitioner's Petition for Writ of Certiorari should be denied. As the Court of Appeals for the Seventh Circuit stated in affirming the decision of the District Court, if an interpretation such as Petitioner's which would result in devastating inroads into the Indiana Workmen's Compensation scheme is to be adopted, its author should be an Indiana court and not a Federal court whose duty is to apply state law as laid down by the courts of the state.

Respectfully submitted,

JAMES E. MCHIE
53 Muenich Court
Hammond, Indiana 46320
Phone: (219) 931-1700
Counsel for Respondent.

G. EDWARD MCHIE
53 Muenich Court
Hammond, Indiana 46320
Phone: (219) 931-1700
Counsel for Respondent.

Of Counsel:
MCHIE, ENSLEN & MORAN
53 Muenich Ct.
Hammond, Indiana 46320
(219) 931-1700

APPENDIX

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Indiana
Hammond Division

No. 69 H 15

DANIEL S. WILSON, JR.

Plaintiff,

vs.

LEHIGH SAFETY SHOE COMPANY, A Pennsylvania Corporation, and BETHLEHEM STEEL CORPORATION, A Delaware Corporation,

Defendant.

PLAINTIFF'S BRIEF ON DEFENDANT'S MOTION TO DISMISS
(Filed Jun 19 1969)

Defendant Bethlehem Steel Corporation has filed a motion to dismiss this cause as to said defendant corporation, asserting as grounds therefor that plaintiff's exclusive remedy is under the Indiana Workmen's Compensation Act and exclusive jurisdiction lays with the Indiana Industrial Broad (sic).

Plaintiff concedes that where the employer-employee relationship has been established by contract between two persons, natural or corporate, unless the parties agree to the contrary or the employment is exempt under the Act, in the event of injury or death suffered by such employee arising out of and in the course of his employment, the parties are bound to pay and accept compensation under the Act for such injury or death. However, where an additional relationship such

as the buyer-seller relationship co-exists with the employer-employee relationship at the time such an injury is incurred, such injured party may proceed as an employee covered by the Act before the Indiana Industrial Board; and, further, may prosecute an action before the Courts of general jurisdiction based upon causes of action available to such injured person arising out of the relationship of buyer and seller even though the seller was at the time of injury the employer of the injured party and such party was injured by accident on the job.

It is clear the legislature intended to make this Act apply only when the employer-employee relationship has been established by contract. Burns 40-1202 reads, in part, as follows:

> "From and after the taking effect of this Act. . ., every *employer* and every *employee,* . . . shall be presumed to have accepted the provisions of this Act, . . . and shall be bound thereby; . . ."

Burns 40-1204 reads, in part, as follows:

> "Every *contract* of service between any employer and employee covered by this Act, written or implied, . . . shall be presumed to have been made subject to the provisions of this Act: Unless either party, . . . shall give notice, . . . to the other party to such *contract.* . .".

Burns 40-1210, 40-1211 and 40-1212 deal with common law actions and defenses available to employers and employees not operating under the Workmen's Compensation Act. Clearly, these sections show that the only abrogation and pre-emption of the common law intended by the legislature at the time this Act was passed were those causes of action and defenses which arose out

of the employer-employee (master-servant) relationship. Burns 40-1205 says:

> "The rights and remedies herein granted to *an employee subject to this Act* . . . on account of personal injury or death by accident shall exclude all other rights and remedies *of such employee,* . . . at common law or otherwise on account of such injury or death . . ."

By implication it is clear that the legislature intended all other causes of action and all other defenses arising from other relationships which could exist contemporaneously with the employer-employee relationship would remain undisturbed by the passage of this Act.

The Act, moreover, specifically preserves causes of action for injuries sustained on the job arising out of relationships other than the employer-employee relationship. Burns 40-1213 reads, in part, as follows:

> "Whenever an injury . . . shall have been sustained under circumstances creating in some other person than the employer and not in the same employ and legal liability to pay damages in respect thereto, the injured employee may commence legal proceedings against such other person to recover damages, *notwithstanding* such employer's . . . liability to pay compensation under this Act. . . ."

This section of the statute, at first blush, would appear to abrogate any conceivable common law causes of action where persons stand in the relationship of employer-employee at the time of injury regardless of what relationship in addition to the employer-employee relationship existed at such time. Statutes in derogation of the common law are strictly construed, however, and the Act nowhere deals with the dual relationship situation.

By construction, therefore, it is apparent the legislature intended to preserve all other common law causes of action and all other common law defenses available to persons in dual relationships at the time of injury on injury on the job, even though one of such relationships was that of employer-employee.

A careful reading of plaintiff's complaint demonstrates that plaintiff does not rely upon the employer-employee relationship in stating its various causes of action against defendant Bethlehem Steel Corporation. Plaintiff does, in fact, rely upon the buyer-seller relationship established when plaintiff purchased from said defendant a week before the accident the safety shoes he was wearing at the time be was injured.

When said defendant voluntarily chose to become a retail shoe merchant in addition to being a producer of iron and steel, said defendant corporation voluntarily removed itself from immunity from suit at common law granted employers by the Indiana Workmen's Compensation Act and became subject to all lawsuits arising from and out of the day to day buyer-seller relationships it voluntarily entered into thereafter with its employees. Plaintiff, as a customer of said defendant retail shoe seller, alleges in his complaint that he was injured by virtue of the acts and omissions of said defendant corporation as a retail shoe merchant and that such acts and omissions of defendant as such were proximate and contributing causes of plaintiff's injuries.

In B.A.Y. Construction Company v. Smallwood et al, (1937) 10 .E. 2nd 750, 104 Ind. App. 277, the Indiana Appellate Court said "The words 'by accident arising

out of' the employment, as used in the Workmen's Compensation Act . . . should be liberally construed, so as to accomplish the humane purposes of the Act." The Act's humane purpose was to give injured employees a speedy means of compensation for injuries suffered by virtue of risks necessarily incurred as such employees. It certainly serves no humane purpose to bar a product liability claim by a strained construction of the coverage of the Workmen's Compensation Act. The Supreme Court of Indiana in Noble v. Zimmerman (1957) 146 N.E. 2nd 828, 237 Ind 556, limited the application of the Workmen's Compensation Act to injuries which arise "out of a risk which a reasonable person might have comprehended as incidental to his employment at the time of entering into it. . . .", 146 N.E. 2nd 838. Certainly, the risk of injury because of defective safety shoes is not a risk incidental to plaintiff's employment by defendant Bethlehem Steel Corporation. The risks incurred by virtue of negligence, breach of warranty, etc., arising out of the sale of safety shoes by said defendant corporation to plaintiff and the causes of action accruing to plaintiff by virtue thereof were certainly not meant to be abrogated or pre-empted by the legislature when it passed the Workmen's Compensation Act. Such causes of action are available to plaintiff against the defendant even though the employer-employee relationship existed at the time of plaintiff's injury. Plaintiff may proceed in this action before this Court against said defendant as a retail shoe merchant, on the causes of action stated in his complaint.

This action should not be dismissed as to said defendant Bethlehem Steel Corporation.

Respectfully submitted,
/s/ William G. Conover
Attorney for Plaintiff

William G. Conover
Conover, Claudon, Bahlmann
and Billings
114 Lincolnway
Valparaiso, Indiana 46383
462-0505

A True Copy:
Attest: Francis T. Grandys, Clerk
By /s/ Hildred Bolsega
Deputy Clerk

ORDER

On February 13, 1969, defendant Bethlehem Steel Corporation moved for dismissal of the action as to it for lack of jurisdiction of the subject matter. The motion is Granted.

/s/ George C. Beamer
U. S. District Judge

Enter: August 14, 1969

MEMORANDUM

While working for Bethlehem Steel Corporation, plaintiff was injured when a piece of steel fell on his foot. Plaintiff was wearing the safety shoes with metatarsal protectors he had purchased at the company store maintained by Bethlehem Steel Corporation at the steel mill where plaintiff worked. Plaintiff alleges that the metatarsal protectors failed, causing his injury.

Defendant Bethlehem Steel Corporation seeks to have the action dismissed as to it on the ground that this Court has no subject matter jurisdiction, because the Indiana Workmen's Compensation Act applies and establishes plaintiff's exclusive remedy against his employer. The relevant statutory provision is Burns' §40-1206:

> The rights and remedies herein granted to an employee subject to this act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death. . . . .

Plaintiff claims that Bethlehem's Steel's act in selling the shoes to the plaintiff was outside the scope of his employment. It is therefore plaintiff's contention that the Indiana Workmen's Compensation Act is inapplicable. This contention is unsupported by the facts in this case and the law of Indiana.

In *Peski* v. *Todd & Brown, Inc.*, 158 F.2d 59 (C.A. 7, 1946), plaintiff's decedent was killed when a train struck the bus in which he was riding to work. Defendant, decedent's employer, owned and operated the bus line for the transportation of its employees from their residences to the plant. Only employees were entitled to use the buses, and they paid the same fare as was paid on common carriers in the vicinity for the same service. Employees were not required to use the company buses. The employees were not under the control of the employer while traveling on the buses and were not paid for the time spent on them. District Judge Swygert dismissed the action stating that the accident occurred in the course of employment, and relief was limited to that under the Workmen's Compensation Act of Indiana. The Seventh Circuit Court of Appeals affirmed, holding at page 60:

> [I]t does not appear that where the *employer* operates the conveyance for the special use of the employee as an incident of the employment, the latter may elect his remedy, whether to proceed as at common law for negligence, or under the Compensation Act. The Act provides by its own terms that the remedy shall be exclusive. Burns' Indiana Statutes, sec. 40-1206. We think this means that where the employer is liable under the Act . . . the Act must furnish the exclusive remedy as to him, regardless of the fact that if a third party were also liable, the employee might have the option to elect whether to proceed against him or the third party. (Emphasis supplied.)

Plaintiff states in rhetorical paragraph 4 of his complaint that defendant Bethlehem Steel Corporation maintained its company store offering for sale at retail to its employees safety equipment, including safety shoes with metatarsal protectors, "to be used by said employees while on their jobs in said steel mill." In rhetorical paragraph 5, plaintiff states that he purchased a pair of these safety shoes with the metatarsal protectors to protect his feet from heavy weights "while engaged in his duties as an employee in said steel mill." It is clear from these statements and from the holding in the *Peski* case, that the purchase of safety shoes by plaintiff from defendant Bethlehem Steel Corporation arose out of and in the course of plaintiff's employment. Plaintiff's remedy under the Indiana Workmen's Compensation Act is exclusive. This Court has no jurisdiction as to defendant Bethlehem Steel Corporation, and the action must be dismissed as to it.

A True Copy:

Attest: Francis T. Grandys, Clerk

By /s/ Hildred Bolsega
Deputy Clerk